No. 512

In the Supreme Court of the United States

OCTOBER TERM, 1942

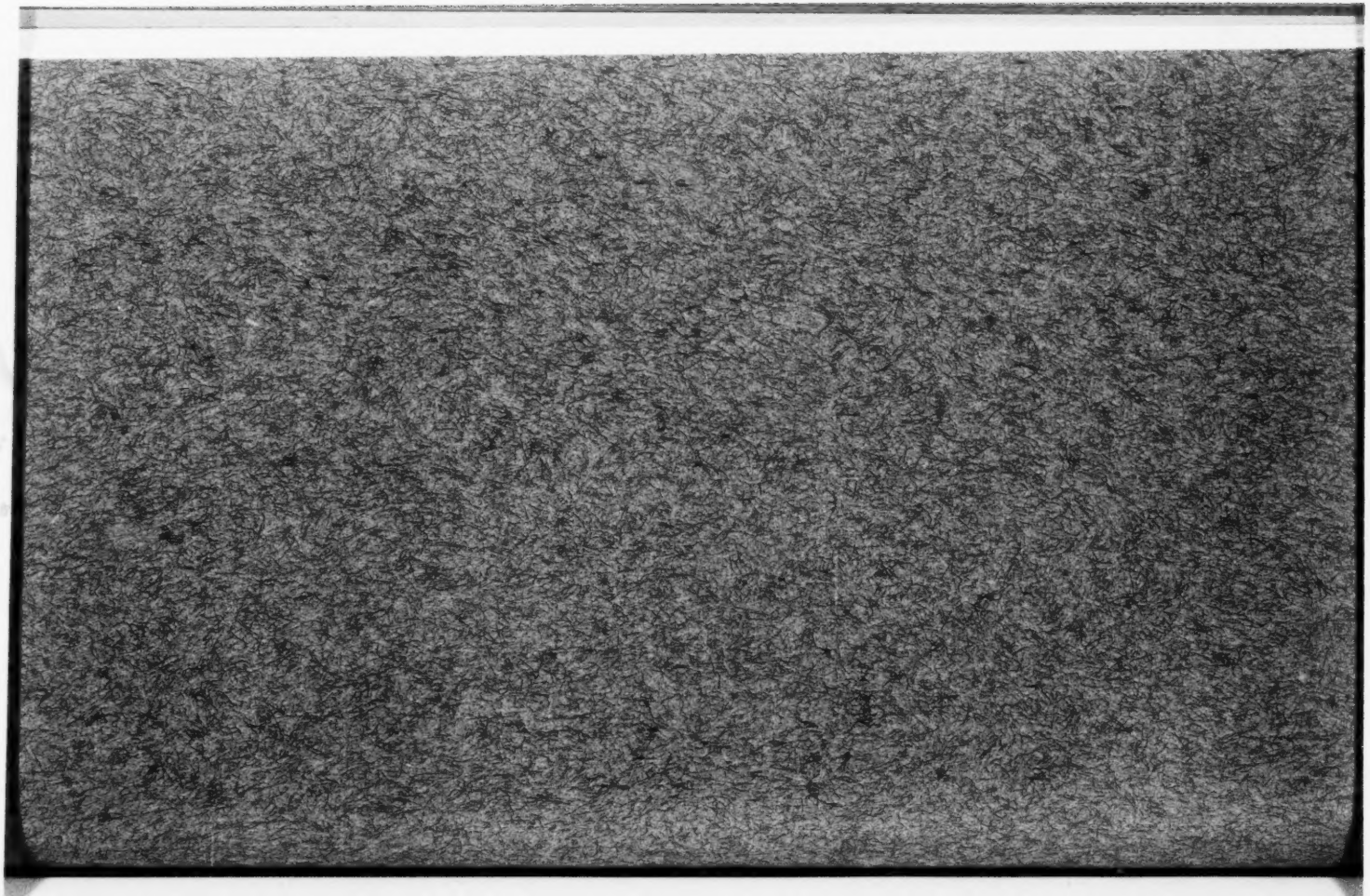
DAVID W. OLIVER, C. WILFRED OLIVER AND HOMER D. OLIVER, COPARTNERS, TRADING AS D. W. OLIVER & SONS, PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION.



INDEX

CITATIONS

628478—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 814

DAVID W. ONAN, C. WARREN ONAN AND ROBERT D. ONAN, GENERAL PARTNERS, DOING BUSINESS AS D. W. ONAN & SONS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court below is reported in 145 F. (2d) 328. The Supplemental Decision and Order of the National Labor Relations Board (R. 5–8) is reported in 57 N. L. R. B. 68. The Decision and Direction of Election (R. 11–15) is reported in 52 N. L. R. B. 1421.

JURISDICTION

The judgment of the court below (R. 31) was entered on October 5, 1944. The petition for a

writ of certiorari was filed on January 4, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, upon the petition of an employer, a circuit court of appeals has jurisdiction to review an order of the Board setting aside an election conducted by it pursuant to Section 9 of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. ~~11–13~~ 9–11.

STATEMENT

Pursuant to a petition filed by Local 1139, United Electrical, Radio & Machine Workers of America, C. I. O., herein called the Union, under Section 9 of the National Labor Relations Act, the Board designated the case as No. 18–R–822, held a hearing, and directed an election to determine whether or not the employees of petitioners, within an appropriate unit, desired to be represented by the Union (R. 11–15). The Union lost the election and thereafter filed objections alleging, in substance, that petitioners had engaged in certain conduct which prevented a free choice of representatives, and requesting the Board to set aside the

election and to order a new election at an appropriate time in the future (R. 5–6, 22–26).[1]

Soon after filing the objections, the Union filed a charge in Case No. 18–C–998, alleging that petitioners had engaged in unfair labor practices in violation of Section 8 (1) of the Act (R. 30). The facts alleged in the charge were "practically identical" with the facts alleged in the objections (*ibid.*). Thereafter, on January 1, 1944, the Board issued an order directing a hearing on the objections to the election, and consolidating Case No. 18–C–998 with the representation proceeding, Case No. 18–R–822 (R. 28–29). However, on January 20, 1944, the Board issued another order severing the two proceedings (R. 29). It then conducted a hearing on the objections which had been filed in the representation proceeding and on July 5, 1944, issued its Supplemental Decision and Order, finding that petitioners had engaged in a course of conduct prior to the election which had "prevented an expression by the employees * * * of their free and uncoerced wishes as to representation," setting aside the election, and stating that a new election would be directed at an appropriate time in the future (R. 6–8).[2]

[1] The objections are incorporated in a document entitled "Protest of Election" (R. 22). Petitioners erroneously refer to the objections as charges (Pet. 3, 11).

[2] No complaint was ever issued as a result of the charge filed in Case No. 18–C–998.

On July 21, 1944, petitioners filed in the court below a petition to review and set aside the Supplemental Decision and Order (R. 1–5). On August 14, 1944, the Board filed its motion to dismiss said petition (R. 8–9), and the court below, on October 5, 1944, handed down its *per curiam* opinion (145 F. (2d) 328) and entered its judgment (R. 31) granting the Board's motion.

ARGUMENT

Petitioner's contention (Pet. 3–5) that this proceeding, in which the Board conducted a hearing on objections to the election and set aside the election, was conducted pursuant to Section 10 (b) and (c) of the National Labor Relations Act and may be reviewed by the circuit court of appeals under Section 10 (f) of the Act is without merit.

The Act gives the Board jurisdiction over two distinct types of proceedings—one covered by Section 9 and relating to a determination of collective bargaining representatives, and the other covered by Section 10 and relating to a prevention of unfair labor practices. Only under Section 10 does the Act provide for review by the circuit courts of appeals: under Section 10 (e), upon petition by the Board to enforce its orders involving unfair labor practices, and under Section 10 (f), upon petition by "any person aggrieved by a final order of the Board"

in an unfair labor practice proceeding to review such order. The Act makes no provision for review by the circuit courts of appeals of proceedings under Section 9, and it is well established that such courts have no jurisdiction to review Section 9 proceedings except where, as expressly provided in Section 9 (d), an order of the Board in an unfair labor practice proceeding "is based in whole or in part upon facts certified" in a representation proceeding. *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401; *National Labor Relations Board* v. *International Brotherhood of Electrical Workers,* 308 U. S. 413; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453, 458–459. As this Court stated in the latter case (at p. 459), "There can be no court review under 9 (d) until the Board issues an order and requires the employer to do something predicated upon the result of an election."

Petitioners contend (Pet. 10–11) that because the conduct alleged by the Union as the basis for setting aside the election is the same as the conduct alleged to be an unfair labor practice in the charge filed by the Union in Case No. 18–C–998, the Board, in the instant proceeding, was obliged to proceed and should be considered as having proceeded under Section 10 of the Act in conducting a hearing on the objections, and that the Board, in finding that the petitioners had engaged

in conduct which prevented an expression by the employees of their free and uncoerced wishes as to representation (R. 8), in fact found that petitioners had engaged in an unfair labor practice. This contention is fully answered by the decision of this Court in *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 458–459, in which the Board, in consolidated proceedings,[3] ordered the employer to disestablish a company union and, in addition, barred that union from the ballot to be used in the election that was directed. The Board's action in striking the company union from the ballot was held non-reviewable; this despite the fact that this action was apparently based on the same facts which showed that the employer had committed an unfair labor practice by dominating the union.[4]

---

[3] Section 9 (c) of the Act expressly provides that the Board, in investigating a controversy concerning representation, shall provide for an appropriate hearing "either in conjunction with a proceeding under section 10 or otherwise".

[4] See also, *Cupples Co., Mfr's* v. *National Labor Relations Board*, 106 F. (2d) 100 (C. C. A. 8), and *DuPont de Nemours & Co.* v. *National Labor Relations Board*, 116 F. (2d) 388 (C. C. A. 4), certiorari denied, 313 U. S. 571, involving consolidated representation and complaint cases in which the circuit courts of appeals set aside Board findings that certain labor organizations were dominated and supported in violation of Section 8 (2) of the Act, but because of lack of jurisdiction to review the represen-

Aside from the fact that no unfair labor practice charge was filed or a complaint issued in this proceeding, the Board made no finding that petitioners had engaged in any unfair labor practice, and consequently it could not have issued, and did not issue, any order requiring petitioners to cease and desist or take any affirmative action.[5] Even if the facts found by the Board as the basis for setting aside the election might, as a matter of law, constitute an unfair labor practice, since the Board has issued no order against petitioners requiring them to do anything as the result of such findings, petitioners are not persons "aggrieved by a final order of the Board" within the meaning of Section 10 (f) of the Act. *American Federation of Labor* and *Falk* cases, *supra*.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The case presents no question of general importance which

---

tation proceedings, declined to modify the Board's Directions of Elections by requiring the Board to include such labor organizations on the ballots.

[5] Petitioner suggests that if no order has been issued, it can "ignore the Order and refuse to hold the requested election" (Br. 19–20). In the first place, a new election has not yet been directed (R. 8), and when it is, the direction is not to the employer but to the Regional Director (R. 14–15).

has not already been decided by this Court. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ALVIN J. ROCKWELL,
General Counsel,
RUTH WEYAND,
FANNIE M. BOYLS,
Attorneys,
National Labor Relations Board.

FEBRUARY 1945.